MOTION FILED
OCT 14 1982

NO. 80-1829

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

T. EDWARD AUSTIN, individually and in his official capacity as State Attorney, Fourth Judicial Circuit, State of Florida, et al.,

Petitioners,

v.

ALICE ROBERTS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF THE AMICUS CURIAE OUT OF TIME, AND BRIEF OF THE AMICUS CURIAE STATE OF FLORIDA, IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMICUS CURIAE, STATE OF FLORIDA, IN SUPPORT OF PETITIONERS, OUT OF TIME

The State of Florida respectfully moves this court for leave to file this brief, as amicus curiae, in support of the petitioners herein, out of time. Rule 36.1, Rules of the Supreme Court provides that the brief of an amicus

curiae prior to consideration of a petition for a writ of certiorari must be filed within the time allowed for the filing of a brief in opposition to a petition for certiorari. Despite the above-cited rule provision, counsel for the Amicus Curiae, State of Florida, mistakenly believed that the State of Florida could file an Amicus Curiae brief within the time period permitted for the filing of an Amicus Curiae brief by the Solicitor General of the United States, inasmuch as the Solicitor General has been expressly invited to file such a brief by the Court. Counsel for the State of Florida respectfully submits that the late submission of its brief is inadvertant, but respectfully requests the Court to accept and consider the attached brief, so as to enable the

Court to rule on the pending petition for writ of certiorari with the benefit of having heard from all interested parties.

INTEREST OF AMICUS CURIAE

The Amicus is the State of Florida, with significant interest in the continued ability of the State Attorneys to investigate suspected fraudulent schemes that impose a burden on the public purse. The opinion below, Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980), has placed in jeopardy the role of the State Attorneys in self-initiated investigations, and as a result, severely limited the investigatory power as described by the Florida Supreme Court in Eagan v. Demanio, 294 So.2d 639, 640 (Fla. 1974):

> The State Attorneys are constitutional officers (Fla. Const., Art. V, §17, Fla. Stat. Ann.), in whom the Legislature vested the duty to protect (Fla

> Stat., §27.02, Fla. Stat. Ann.).
>
> Before filing an information under oath (Fla. Const., Art. I, §15, Fla. Stat. Ann.), they necessarily must conduct an investigation to determine whether or not they should execute the statutory oath. . . Investigating activity is necessary to the efficient execution of a prosecutor's duty . . .

Because the broad investigatory power given the State Attorneys is necessary to ensure the independence of these officers, this case presents clearly the opportunity for affirmation of a broad, although not unrestricted, power of investigation for all state attorneys.

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit Court of Appeals in Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980), unreasonably intrudes upon the lawful authority of Petitioner State Attorney for the Fourth Judicial Circuit of Florida, by preventing him from investigating fraud in the Federal Food Stamp Program, absent a referral by the Florida Department of Health and Rehabilitative Services. The Court of Appeals' decision misconstrues the meaning and intent of Congress in providing for a certain amount of privacy to food stamp recipients as part of the application process.

Inasmuch as Petitioners have not violated any constitutional right to privacy enjoyed by Respondents in Petition-

ers' enforcement of the State's criminal laws prior to the injunction mandated by the Fifth Circuit, the Attorney General of Florida, as Amicus Curiae, respectfully urges this Court to grant the Petition for a Writ of Certiorari, so as to remove the prohibitory effect of the injunction and to enable Petitioners to comply with their lawful duties and responsibilities in the administration of the laws of Florida.

ARGUMENT

The Attorney General of Florida is in concurrence with the Petitioners in that it is indeed a "travesty" to deny the State Attorney's Office the necessary authority to initiate an investigation into food stamp recipients' files when there is reliable information available which demonstrates the fraud rate of said recipients to be as high as 40% in a given geographical region. The integrity of both the State Attorney's Office and the federal Food Stamp Program is here at stake. Because Congressional intent at the institution of the Food Stamp Program was to aid in the alleviation of hunger in America, and because hunger is an issue that is universally basic to all people, and because no law enforcement

agency in the State of Florida is more basic to the enforcement of the laws of Florida, the Attorney General of the State of Florida concurs with the Petitioners that these are "special and important reasons" pursuant to Rule 17.1, Rules of the Supreme Court of the United States, and thus a Writ of Certiorari should be granted.

The decision by the United States Court of Appeals for the Fifth Circuit has addressed an important question of federal law--one that has not been settled by this Honorable Court--and thus pursuant to Rule 17.1(c) of the Rules of the Supreme Court of the United States, this Court should grant certiorari. The decision in this cause by the Fifth Circuit is one which would seriously inhibit the investigatory powers of the

State Attorney's Office, even in the situation where the suspected fraud rate is as high as 40%. Where fraud exists in a program such as the federal Food Stamp Program, it is without question that the purpose of the program is being violated and abused. Since the purpose of the Food Stamp Program is to help in alleviating America's hunger, any incident of fraud committed against the Program serves to defeat the noble cause that the Program was designed to serve. The decision of the Fifth Circuit Court of Appeals further serves to emasculate the State Attorney's Office by prohibiting them from investigating other areas of suspected criminal activity. Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980).

In the investigation by the State Attorney into food stamp fraud in Nassau

and Clay Counties, Florida, it is important to note that the successful prosecution rate was in excess of ninety percent (90%). Now that the State Attorney's Office has been enjoined, it is of more importance to note that the prosecution rate, based on inquiry by the State Attorney, has in effect been reduced to zero.

As propounded by the Petitioners, the inquiry by the State Attorney into possible fraud actually promoted the ultimate purpose of the Food Stamp Act. According to 7 U.S.C. §2011, that purpose is "to safeguard the health and well-being of the nation's population by raising levels of nutrition among low-income individuals" and "to alleviate such hunger and malnutrition." It cannot be questioned that an effort to collar

and heel abusers of the Food Stamp Act is in reality an effort to ensure that funds are channeled to "low-income individuals." Of utmost importance is the public's perception that Food Stamp benefits are going to the truly needy, and the investigatory efforts of the State Attorney's Office likewise served that end. Further, the actions of the State Attorney helped to enforce a Florida Statute which renders food stamp fraud a state crime. The decision of the Fifth Circuit loses sight of these goals.

The Attorney General of Florida concurs with the Petitioners in that the effect of an injunction as was herein issued, which prohibits the distributing agency, Health and Rehabilitative Services (HRS), from releasing files to the State Attorney until HRS has deter-

mined that a reasonable suspicion of fraud exists, is to severely limit the investigatory power of the State Attorneys.

The Florida Supreme Court, in Eagan v. Demanio, 294 So.2d 639 (Fla. 1974), set forth the duties of the State Attorney's Office, which included: ". . . Investigating activity is necessary to the efficient execution of a prosecutor's duty." In compliance with that decision, a Florida District Court of Appeal has held "the State Attorney's power to investigate should not be lightly circumscribed by protective orders designed to accommodate the convenience of witnesses." Florida v. Seivert, 312 So.2d 788 (2nd DCA, Fla. 1975). Furthermore, the Florida Supreme Court has described the State Attorney as a "one-man grand jury."

Imperato v. Spicola, 238 So.2d 505, 506 (Fla. 1970).

The Attorney General of Florida acknowledges, as do the Petitioners in this cause, that the authority of the State Attorneys in Florida can never unconstitutionally intrude on a federally cognizable right. It is our contention, however, that no federal right has been pre-empted in the case at bar. The so-called rights, which Respondents claim to have been violated, are insufficient to sustain the injunctive relief granted.

Both the Fifth Circuit Court of Appeals and Respondents herein have failed to cite either statutory or regulatory provisions which expressly prohibit access to food stamp recipient files. Conversely, the Petitioners-Defendants have exhibited a reasonable

pursuit of legitimate functions in the Office of the State Attorney. They have likewise acted in a manner so as to promote the intent of the federal Food Stamp Act.

The Attorney General of Florida, as Amicus Curiae, urges this Court to examine the manner in which the Fifth Circuit interpreted the applicable regulations. Section 273.2(e), 7 CFR states: "The Applicant's right to privacy shall be protected during the interview." The Fifth Circuit in its interpretation of this regulation cites nothing that would indicate a broader intent than an interest in the confidential circumstances surrounding each particular interview. It is reasonable to interpret this regulation to mean that forthrightness by the applicant is encouraged for the interview.

Another regulation, 7 CFR §273.2(f), limits the circumstances in which a worker certifying an applicant's eligibility for food stamps can verify the information given by the applicant. As is the case with 7 CFR §273.2(e), this regulation is specifically limited to the application processing by the distributing agency. Indeed, Section 273.2 of 7 CFR is entitled "Application Processing". Thus, the interpretation given the regulation by the Fifth Circuit is misguided.

In 7 CFR §273.16(e)(2), the Fifth Circuit said the regulation indicated a careful limitation of referrals for prosecution to those "cases where individuals are suspected of committing fraud." Roberts v. Austin, 632 F.2d 1202, 1210 (5th Cir. 1980). The Attorney General

of Florida concurs with Petitioners that the purpose of this regulation is to "encourage" such referrals for prosecution. It is generally important as public policy to ensure that fraud in a program such as food stamps is vigorously pursued. This regulation goes on to say that referrals of fraud are encouraged, "particularly if large amounts of food stamps are suspected of being fraudulently obtained or the individual is suspected of committing more than one act." The intent of the regulation thus becomes apparent. HRS is to refer to the State Attorney for prosecution those cases of fraud which hurt the public purse the most. The cost of fraud to taxpayers and the integrity of the federal Food Stamp Program are the paramount

concerns. No other regulations prohibit the State Attorney from initiating his own investigation, nor do any suggest that referrals of fraud by HRS should be the only manner in which fraudulent schemes are investigated. The Office of the State Attorney shares an interest with this specific regulation [7 CFR §273.16 (e)(2)] in that both are concerned with the protection of the public purse and the integrity of the federal Food Stamp Program.

Thus, the injunction was based on regulations which nowhere expressly or explicitly limit the access of local law enforcement to food stamp recipient files. The regulations, upon which the decision of the Fifth Circuit rests, are designed to cover only the internal operations of the distributing agency (in

Florida, HRS). The language of 7 CFR §273.16(e) does, however, specifically acknowledge the authority of a state court to disqualify an individual from food stamp benefits "if the court finds the individual guilty of civil or criminal fraud." This disqualification is "separate and apart from any action taken by the state agency to disqualify the individual through an administrative fraud hearing." As the Petitioners emphatically point out, the regulations expressly recognize a procedure for disqualifying a food stamp recipient that is rendering the recipient ineligible, which is totally outside of the regulations. The state court system, with its procedures, thus becomes the proper outside channel. The Office of the State Attorney is one such authority.

The decision of the Fifth Circuit in Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980), would entirely preclude inquiries by the State Attorney's Office in cases which involved corruption by HRS caseworkers. The Fifth Circuit deals superficially and inadequately with this potentially realistic problem. Roberts v. Austin, supra, at 1211, expressly prohibits the release of a food stamp recipient's file to the State Attorney's Office until the state agency (HRS) makes a determination that there is some reason to suspect fraud. In a situation where an HRS caseworker is suspected of fabricating a fictional recipient or manipulating a particular recipient's file so that food stamps are over-issued and where the HRS worker obtains a monetary benefit from such scheme, there is little

possibility that HRS would ever make a determination that fraud was suspected in that case. It is important as a matter of public policy that a third, outside party have the investigatory power necessary to remedy such a situation. It is herein alleged that there is no party which more appropriately possesses such outside investigatory power than the State Attorney's Office.

Additionally, it is important to note, as was pointed out by the Petitioners, that it is entirely possible that not all state food stamp agencies are of the same level of expertise as is the Florida Department of Health and Rehabilitative Services. Those agencies may lack the requisite skill necessary to make an adequate determination of reasonable suspicion of fraud in a recipient's

file. In such event, the necessity for an outside investigator is imperative.

The Petitioners allege, and the Attorney General of Florida concurs, that the rendering of the primary prosecutorial agency, the State Attorney, to a position totally subservient to a prior determination by an HRS caseworker offends the concept of federal-state comity, as well as the integrity of the prosecutorial authority. Certainly, in a situation where there exists information in the hands of the State Attorney that the fraud rate among food stamp recipients may be as high as 40%, it is reasonable and of benefit to the tax-paying public for the State Attorney's Office to investigate such allegations. In fact, to ignore such information in the face of such evidence

would be dilatory on the part of any conscientious State Attorney.

Roberts v. Austin, supra, at 1213, uses the language "fishing expedition", and cites congressional discourse disapproving of the harassment of applicants in the verification process of the state food stamp program. As Petitioners state, and with which the Attorney General of Florida concurs, harassment and blind fishing should not be allowed. However, where a potential fraud rate of 40% is suspected, the legitimate authority of law enforcement cannot reasonably be referred to as harassment or a "fishing expedition".

The so-called intrusion by the State Attorney was de minimus. As logically pointed out by the Petitioners, it was no more intrusive than when a bank uses

typical verification procedures in approving loan applications. The Attorney General of Florida concurs with the Petitioners in this cause, that the release of the recipient's files to the State Attorney's Office by HRS was no more than a transfer of public documents. Davis v. United States, 328 U.S. 580 (1946). Additionally, since the State Attorney is an elected official who is clothed with the constitutional power to enforce Florida's laws, see Eagan v. Demanio, 294 So.2d 639 (Fla. 1974), he should have at least the same access as an auditor. 7 U.S.C. §2020(a). As Petitioners succinctly state:

> "The purpose of the Food Stamp Act cannot be promoted where existing techniques to ferret out fraud allow a fraud rate as high as forty percent (40%). Any regulations that perpetrate rampant fraud by stifling

> otherwise legitimate attempts to probe it should be struck down."

Petitioners do not request a free reign of investigatory power for the State Attorney's Office, but rather ask that where evidence is available that fraud is occurring at an unusually high rate, such investigatory powers of the State Attorney's Office should not be abridged.

The limitation imposed upon the State Attorney's investigatory power is unduly restrictive and contrary to public policy, in that the State Attorney is prohibited from initiating an investigation unless there has previously been an HRS determination. It is the position of this Amicus Curiae that it is reasonable, in accordance with Branzburg v. Hayes, 408 U.S. 665 (1972), that this Court could impose a prerequisite that

there be an exception to the State Attorney's investigatory power in "a general problem area." It is likewise reasonable to view a suspected fraud rate of 40% in a geographical area as a general problem area.

For the reasons stated herein, and the reasons likewise stated by the Petitioners, the Attorney General of Florida prays that this Honorable Court grant Petitioners' Petition so that the injunction imposed against them may be lifted.

CONCLUSION

For the foregoing reasons, on the basis of the authority cited, the Attorney General of Florida, as Amicus Curiae, respectfully requests this Court to issue a Writ of Certiorari to the Fifth Circuit Court of Appeals and to reverse the opinion rendered in Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980).

Respectfully submitted,

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